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No. 92-938

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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MAURICE RIVERS and ROBERT C. DAVISON,
*Petitioners,*

v.

ROADWAY EXPRESS, INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED

Whether Section 101 of the Civil Rights Act of 1991 applies to claims arising from conduct which occurred and which was adjudicated to be non-discriminatory prior to the date on which Section 101 became law.

## PARENTS AND SUBSIDIARIES

In accordance with Rule 29.1 of the Rules of the Court, respondent included its list of parent companies and subsidiaries in its Brief in Opposition to Petition for Writ of Certiorari, at ii.

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IN THE

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OCTOBER TERM, 1992

No. 92-938

MAURICE RIVERS and ROBERT C. DAVISON,
*Petitioners,*

v.

ROADWAY EXPRESS, INC.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF FOR THE RESPONDENT

### STATUTES INVOLVED

The statute involved in this case is the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. It is reprinted in Appendix B of the brief of petitioner in No. 92-757, and is excerpted in the brief of petitioners.

### STATEMENT OF THE CASE

1. Petitioners Maurice Rivers and Robert C. Davison are black garage mechanics who previously were employed by respondent Roadway Express, Inc. (Pet. App. 2a). In August 1986, garage supervisors of respondent scheduled disciplinary hearings for petitioners based on their accumulated work records, including problems of absenteeism, poor workmanship, and insubordination (*id.*; Guy Dep. at 158-60 & Exs. 47, 48 (Aug. 12, 1987)). After petitioners were notified of the hearings but failed to attend, they were suspended for two days (Opp. App.

A4-A5). Petitioners filed grievances, claiming that they had not received proper notice of the hearings, and were awarded back pay (*id.* at A5-A6).

A garage manager of respondent then scheduled new disciplinary hearings during working hours for petitioners and some white mechanics (Opp. App. A6-A8). Petitioners and one white mechanic refused to attend (*id.* at A7-A10). As a result, on September 26, 1986, petitioners and the white mechanic were discharged "for refusing several direct orders to attend the hearings and for [their] accumulated work record[s]" (Pet. App. 3a).

2. On December 22, 1986, petitioners, along with another discharged mechanic, James T. Harvis, Jr. (collectively, "plaintiffs"), filed a complaint in district court against respondent and their union local (R.1). The complaint alleged that respondent had violated 42 U.S.C. Section 1981 and the governing collective bargaining agreement by discharging plaintiffs because of their race and without just cause (R.1 at 1-5). The complaint further alleged that the union had violated its duty of fair representation in processing plaintiffs' grievances (*id.* at 1, 4-5). On October 18, 1988, plaintiffs amended their complaint, adding discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (J.A. 15a-20a; *see* Opp. App. A3).

On November 30, 1988, the district court granted summary judgment against the plaintiffs on their breach of collective bargaining agreement and duty of fair representation claims, finding that, "[d]espite [the] extensive record" in the case, "plaintiffs have failed to present any evidence of arbitrariness, discrimination or bad faith in the processing of their grievances" (J.A. 29a). Subsequently, the court separately submitted plaintiff Harvis' Section 1981 discharge claim to a jury, which, on June 13, 1989, returned a verdict in favor of respondent and against Harvis (Pet. App. 20a).



On July 10, 1989, the district court issued an Order directing petitioners to show cause why this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not require dismissal of their Section 1981 claims (Pet. App. 19a). On January 19, 1990, the court dismissed those claims (*id.* at 24a). The court then held a bench trial on petitioners' Title VII retaliation and discharge claims and, on October 18, 1990, entered judgment for respondent, finding that "black employees were not treated differently than white employees with respect to the scheduling of disciplinary hearings," and that petitioners were discharged "for refusing direct orders and for [their] accumulated work record[s]" and "not . . . because of [their] race" (Opp. App. A6, A9, A10, A13).

3. On November 21, 1991, while petitioners' appeals were pending, Congress passed the Civil Rights Act of 1991 ("the Act" or "CRA"), Pub. L. No. 102-166, 105 Stat. 1071 (1991). Among other provisions, the CRA amended Title VII, Section 1981, the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* In particular, Section 101(b) of the Act expanded Section 1981 to cover "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072.

4. Eight months later, on August 24, 1992, the court of appeals affirmed in part, reversed in part, and remanded for further proceedings on petitioners' retaliation claims (Pet. App. 2a). The court first held that, under *Patterson*, the district court had properly dismissed petitioners' race discrimination in discharge claims (*id.* at 2a, 4a-6a). The court next held that petitioners' retaliation claims survived *Patterson* and that relitigation of these retaliation claims is not precluded by the district court's

prior Title VII judgment (*id.* at 2a, 6a-10a). Finally, the court rejected petitioners' argument that the Act should be applied retroactively to their Section 1981 claims, reasoning that "retroactive application of the 1991 Act would affect 'substantive rights and liabilities of the parties' " (Pet. App. 13a (quoting *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992)). Accordingly, the court remanded for further proceedings only on petitioners' "§ 1981 claims based on retaliation for attempting to enforce contract rights" (Pet. App. 14a).[1]

## SUMMARY OF ARGUMENT

I. The principle that legislation looks forwards, not backwards, and its corollary that retroactivity is not favored in the law, are deeply rooted in this nation's most basic concepts of justice and limited government through checks and balances. It is a basic concept of justice that citizens should have fair warning of the law and its sanctions so that they can avoid these sanctions if they wish. It is also a basic concept of limited government through checks and balances that the power retroactively to identify wrongdoers and impose sanctions is a power more properly exercised in the enforcement of the law than in the course of framing the law. These concepts of justice and limited government through checks and balances are reflected in the rule of construction that this Court has applied for nearly two hundred years in interpreting nonpenal civil statutes—namely, that nonpenal civil statutes will be presumed not to apply to conduct or trials that occurred before the dates of their enactment unless their terms clearly and unequivocally command such a retroactive effect.

[1] Petitioners and the Solicitor General suggest (Pet. Br. 9, 14, 29; U.S. Br. 26 n.15) that the remand of petitioners' retaliation claims reopens the district court's Title VII judgment on their discharge claims as well. But the court of appeals affirmed the district court's disposition of the discriminatory discharge claims, and did not purport to remand on those claims; it remanded only on the retaliation claims (Pet. App. 2a, 4a-7a, 14a).



II. The Civil Rights Act of 1991 does not clearly and unequivocally command such a retroactive effect. The language of Section 402(a) of the Act, which states that "[e]xcept as otherwise specifically provided, the Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. 1099, is facially ambiguous. But Congress had previously passed numerous statutes with the same or similar language, which courts had construed to have only a prospective effect. Congress is presumed to have been aware of this prior judicial interpretation and, by including such language in Section 402(a), to have adopted that interpretation for purposes of this Act.

Construing Section 402(a) to make the Act generally prospective would not, as petitioners and the Solicitor General contend, improperly deprive other effective date provisions in the Act of independent and particular effect. Section 402(a)'s "[e]xcept as otherwise specifically provided" language derives meaning from Section 102 of the Act, by ensuring that the latter section's provisions for damages and jury trials in cases brought under the Americans with Disabilities Act ("ADA") of 1990 would not apply until the ADA's employment provisions themselves became effective—seven months after the CRA's effective date. Likewise, Section 402(a)'s independent and particular effect is to avoid for the Act in general the unambiguous resolution of the prospectivity versus retrospectivity question that Sections 109(c) and 402(b) of the Act unambiguously resolve for the particular statutory sections to which they respectively apply.

III. The alternative argument of petitioners and the Solicitor General that Section 101 should be judicially presumed to apply retroactively is also unsound. As petitioners and the Solicitor General concede, the broadly-stated presumption of retroactivity set forth in this Court's decision in *Bradley v. School Board*, 416 U.S. 696, 711 (1974), does not apply where a law "affect[s] substantive rights and liabilities." *Bennett v. New Jersey*,

470 U.S. 632, 639 (1985). Section 101 is plainly such a law.

A. Contrary to the argument of petitioners and the Solicitor General, Section 101 neither merely creates new remedies and procedures for pre-existing wrongs under Title VII nor merely "restores" Section 1981 to some supposed prior state. Section 101 is a distinct positive law that outlaws much conduct that Title VII does not outlaw; and Section 101 does not lose its substantive content merely because Title VII outlaws some of the same conduct. Likewise, Section 101 is not a law that merely "restores" Section 1981 to a state allegedly intended by the Congress that first enacted it. While factions in Congress favored enacting such a restorative law, the majority did not enact a law that purports to do so—as the statute's language and legislative history make clear.

B. Even if Section 101 could properly be characterized as a remedial, procedural or restorative law, however, it still should be governed by the traditional presumption against retroactive application of statutes. The Court has held that the traditional presumption applies to laws by which human action is regulated. The new substantive rights and correlative remedies that Section 101 creates (and to which a jury trial right implicitly attaches) plainly may constitute such laws.

Application of the traditional presumption to Section 101 furthers the principles of justice and limited government that underlie the presumption of prospectivity. Under these principles, citizens should have notice of the sanctions that may be applied to their conduct, and a fair opportunity to avoid those sanctions. Likewise, citizens should not be judged or punished by later created legislative standards—even those that purport to impose standards that previously existed in the law. In a system of limited government, Congress is presumed ill-suited to create such retrospective damages rules and behavioral standards. While Congress has the power to act retrospectively, the principles of justice and limited government through checks and balances that underlie the presumption of prospectivity require that Congress make clear its intent to do so.



There is no sound jurisprudential or doctrinal reason for ignoring these principles in the context of Section 101. Contrary to petitioners' contention, this Court's case law does not justify exempting remedial, procedural, or restorative statutes from the traditional presumption of prospectivity. Moreover, adoption of a different presumption for laws like Section 101 would not only undermine the basic principles of justice and limited government through checks and balances that underlie the presumption of prospectivity, but it would also needlessly increase the workload of the courts—which would have to start pigeonholing laws as either "substantive," "remedial," "procedural," or "restorative" in order to determine which presumption is applicable—and unnecessarily complicate and confuse the process of interpreting statutes. To the extent that *Bradley* may be read to support such a presumption of retroactivity, the Court should make clear that it no longer states the governing law.

## ARGUMENT

The question here is whether Section 101 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-72 (1991), is to be given retroactive application—*i.e.*, whether the rights that Section 101 establishes (and the remedies and jury trial right that implicitly attach to those rights) are to be applied to conduct that occurred, and that was adjudicated to be non-discriminatory, prior to the passage of the Act. The answer to that statutory interpretation question, as with all statutory interpretation questions, must be found in the language and structure of the Act, read against the relevant background legislative materials. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

In this instance, however, that exercise does not take place in a vacuum. This Court has announced that "[i]t is a principle which has always been held sacred in the United States that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (Marshall, J.). This principle governs this case.

To be sure, petitioners do not accept this principle as the law. Based on *Bradley v. School Board*, 416 U.S. 696 (1974), they argue instead that, where remedial, procedural or restorative laws are concerned, Congress is presumed to have intended that its statutes will be applied retroactively unless manifest injustice would result, or unless there is statutory direction to the contrary.

That being so, we proceed as follows: First, we explore the reasons for and background to the traditional presumption of prospectivity. Then, we address the statutory materials and demonstrate that, under the traditional presumption, Section 101 of the Act may not be applied retroactively. Finally, we demonstrate that, contrary to petitioners' argument, Section 101 is not a mere remedial, procedural or restorative law and that, even if it were, the traditional presumption would apply and would preclude retroactive application of Section 101.

## I. A STATUTE SHOULD NOT BE APPLIED TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT UNLESS ITS TERMS CLEARLY AND UNEQUIVOCALLY COMMAND A RETROACTIVE EFFECT

The principle that legislation "look[s] forwards, not backwards," *Reynolds v. M'Arthur*, 27 U.S. at 434, and its corollary that "[r]etroactivity is not favored in the law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), are deeply rooted in the most basic concepts



of justice and in the system of limited government through checks and balances that is the particular genius of our constitutional plan. As Justice Story noted, "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." Joseph Story, *Commentaries on the Constitution*, § 1398 (3d ed. 1858).

The justice component of these principles has an ancient lineage. Since the time of the Greeks and Romans, it has been recognized that, "as a matter of justice[,] laws should not be enforced before the subjects have an opportunity to become acquainted with them." Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936) (citing 1 William Blackstone, *Commentaries* *46 (1765)). *See also Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 837, 855 (1990) (Scalia, J., concurring). This Court has thus stated that time-honored principles of law require that statutes "give fair notice of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

As Justice Story suggested, however, in American law, the principle that conduct should be judged under the law that existed when the conduct took place is not based solely on concepts of justice. It is also based on a principle of limited government through checks and balances—specifically, the principle that the retrospective identification of wrongdoers and imposition of punishment is a power more properly exercised in the enforcement of the law than in the course of framing the law. *See Dash v. Van Kleeck*, 5 Am. Dec. 291, 310 (1811) (Kent, J.) (disfavor of retroactive laws is based on the notion that "the power of the law-giver is limited and defined"); Smead, *supra*, at 797 (American law "transpos[ed] [the] principle [against retroactive laws] . . . into an effective transcendental limitation on legislative power"); *see also* The Federalist No. 44, at 128-29 (James Madison). As Justice Harlan explained in the context of the criminal law:

> Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.

*James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part, dissenting in part). *Accord, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring) (noting applicability of these concerns in the civil law context).

This healthy mistrust of retroactive laws—criminal and civil—is reflected in the constitutions of both the United States and the several states. To ensure that "legislatures [are] restrained from enacting arbitrary or vindictive legislation," *Miller v. Florida*, 482 U.S. 423, 429 (1987), and that "legislative enactments give 'fair warning of their effect,'" *id.* at 430 (citation omitted), the Constitution's Ex Post Facto and Bill of Attainder clauses proscribe all retroactive punitive legislation. *See* U.S. Const., art. I, § 9, cl. 3. The constitutions of several states even more broadly outlaw all legislation, including civil legislation, which has retroactive effects. *See, e.g.*, N. H. Const., pt. 1, art. 23; Colo. Const., art. II, § 11; Mont. Const., art. XIII, § 1, cl. 3; Ohio Const., art. II, § 28. And the federal constitution, while not proscribing all retroactive civil legislation, generally bars (or demands compensation for) civil laws that destroy or impair vested or contractual rights, *see, e.g., Hodel v. Irving*, 481 U.S. 704 (1987); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), and requires that "[t]he retrospective aspects of [all] legislation, as well as the prospective aspects, . . . meet the test of due process," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Indeed, this Court has made it clear that "the justifications for the latter may not suffice for the former," *id.*, and has stated that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness." *Id.* at 17-18.



Not surprisingly, the rules of construction that this Court has adopted for interpreting nonpenal civil statutes reflect the same skepticism about retroactive laws. *Accord, Bonjorno*, 494 U.S. at 855-56 (Scalia, J., concurring); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227-29 (7th Cir. 1992) (Posner, J.), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977). Thus, the Court has announced that " 'the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past . . . .' " *Greene v. United States*, 376 U.S. 149, 160 (1964) (citation omitted). Applying this "first rule" of construction, the Court has long held that:

> Words in a statute [do not] have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

*United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806).[2]

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[2] *See also, e.g., Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952) ("[A] statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication"); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears"); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears."); *Schwab v. Doyle*, 258 U.S. 529, 537 (1922) ("It is the proclamation of both [principle

As Justice Scalia has explained, this presumption of non-retroactivity "gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend." *Bonjorno*, 494 U.S. at 856 (Scalia, J., concurring). And, by requiring that Congress be explicit about its intentions, the principle impedes retrospective legislative sanction of specific persons or classes of persons and thus holds the legislature's "awesome power . . . a little in check." *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d at 228 (Posner, J.). The presumption of prospectivity thereby promotes the same principles of justice and limited government through checks and balances that underlie the more express and unyielding constitutional protections against retroactive laws. *Accord*, Joseph Story, *Commentaries on the Constitution*, § 1398; *Luddington*, 966 F.2d at 227-28.[3]

Of course, "[i]t will remain difficult, in many cases, to decide whether the presumption has been overcome by text, and indeed to decide whether a particular application *is* retroactive." *Bonjorno*, 494 U.S. at 857 (Scalia, J., concurring) (emphasis in original). Whether a particular application is retroactive will "depen[d] upon what one considers the determinative event by which retroactivity or prospectivity is to be calculated." *Id.* at 857 n.3. And many new laws—especially new laws concerning trial procedures such as jury trials and evidentiary rules—will typically be triggered only by events that occur after the dates of their enactment. *Accord, Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d

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and authority] that a statute should not be given a retrospective operation unless its words make that imperative. . . .").

[3] As Justice Scalia noted in his concurrence in *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 837, 841-42 n.1 (1990), the presumption of non-retroactivity is inapplicable in the context of laws repealing punishments. *See Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871). Such laws repealing punishments implicate none of the concerns that inform the longstanding jurisprudential disfavor of retroactive laws.



929, 939 & n.5 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992) (except when applied to cases already adjudicated, rules aimed at trial procedure generally do not require retroactive application). But where a retroactive application of a nonpenal civil statute is sought, the presumption against retroactivity is "very strong," *United States Fidelity and Guar. Co. v. United States*, 209 U.S. 306, 314 (1908), and remains the governing principle today.

Thus, in *United States v. Security Industrial Bank*, this Court held that:

> [A] retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

459 U.S. 70, 79 (1982) (citation omitted). Likewise, in *Bennett v. New Jersey*, 470 U.S. 632, 641 (1985), the Court reiterated that nonpenal laws will be construed to apply only prospectively "absent a clear indication to the contrary in the relevant statutes or legislative history." And, in *Bowen v. Georgetown University Hospital*, 488 U.S. at 208, the Court said that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

## II. THE CIVIL RIGHTS ACT OF 1991 DOES NOT CLEARLY AND UNEQUIVOCALLY COMMAND APPLICATION OF ITS TERMS TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT

In this case, petitioners recognize that they are seeking to apply the Civil Rights Act of 1991 retroactively. Specifically, they state (Pet. Br. 9, 14) that they are seeking to apply Section 101's new substantive rights to conduct that occurred prior to the Act's enactment and that, if the Court does not do so, the correlative damages remedies and jury trial rights that impliedly attach to

Section 1981 claims will not be available to them. Indeed, although they attempt to evade the issue by suggesting (Pet. Br. 9, 29) that the court below vacated a discharge ruling that it in fact affirmed (*see* note 1, *supra*), petitioners are in fact seeking to have Section 101's new rights and correlative damages remedies and jury trial rights applied retroactively to claims that have already been adjudicated and have been held to be without merit.

Under this Court's traditional presumption, the Act may be retroactively applied in this unjust and wasteful fashion only if the statute clearly and unequivocally commands such an application. Contrary to the argument of petitioners and the Solicitor General, nothing in the Act's language, legislative history, or purposes provides this clear and unequivocal command.

### A. The Language Of Section 402(a) Does Not Clearly And Unequivocally Command Retroactivity

The Act's general effective date provision, Section 402(a), provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." As the court below and a number of other courts of appeals have concluded, this ambiguous language has a variety of conceivable meanings: "it could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of the date of enactment." *Rivers v. Roadway Express, Inc.*, No. 91-3348 (6th Cir. Aug. 24, 1992) (Pet. App. 12a). *See also, e.g., Gersman v. Group Health Ass'n*, 975 F.2d 886, 888-89 (D.C. Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 13, 1993) (No. 92-1190); *Rowe v. Sullivan*, 967 F.2d 186, 192 (5th Cir. 1992); *Mozee*, 963 F.2d at 932-33.

When Congress included this facially ambiguous language in the Act, however, it was not writing on a



clean slate. This statutory language had been used many times before and the courts had routinely interpreted this language to apply only to conduct and trials occurring after the date of the statutes' enactments. *See, e.g., Yakim v. Califano*, 587 F.2d 149, 150 (3d Cir. 1978) (Black Lung Benefits Reform Act of 1977); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 529 (4th Cir.) (National Flood Insurance Act), *cert. denied*, 112 S. Ct. 417 (1991).

Indeed, Congress had included such language in the 1978 amendments to Title VII made by the Pregnancy Discrimination Act ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 (1978), which overruled this Court's decision in *General Electric v. Gilbert*, 429 U.S. 125 (1976), and in the 1978 amendments to the ADEA, Pub. L. No. 95-256, 92 Stat. 189 (1978), which overruled this Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977). Again, courts construing the PDA and the 1978 ADEA amendments held that those statutes applied only to conduct and trials occurring after the dates of their enactments. *See, e.g., Jensen v. Gulf Oil Refining & Mktg. Co.*, 623 F.2d 406, 413 (5th Cir. 1980) (construing 1978 ADEA amendments); *Sikora v. American Can Co.*, 622 F.2d 1116, 1123-24 (3d Cir. 1980) (same); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (construing PDA); *Schwabenbauer v. Board of Education*, 667 F.2d 305, 310 n.7 (2d Cir. 1981) (same).

Congress is presumed to have been aware of the prior judicial interpretation of this language and, by including that language in Section 402(a), to have adopted that interpretation for purposes of this Act. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). This presumption is especially appropriate where, as here, the Act amended the very same statutes that had previously been amended—and amended with prospective effect

only—through the same "effective date" language used here. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978).[4]

### B. The Act's Structure And Legislative History Do Not Clearly And Unequivocally Command Retroactive Application

In seeking to avoid the facial ambiguity of Section 402(a)'s language and the suggestion of prospectivity that arises from prior judicial interpretation of statutes containing similar language, petitioners and the Solicitor General argue (Pet. Br. 12-18; U.S. Br. 6-7, 12-15) that Section 402(a) must be construed as generally rendering the Act retroactively applicable in order to give independent and particular effect to other language in the Act concerning effective dates. Indeed, joined by the petitioners in *Landgraf v. USI Film Products*, No. 92-757 (U.S. cert. granted Feb. 22, 1993) (Pet. Br. 92-757, at 15-20), but not by the Solicitor General (U.S. Br. 15-16), petitioners argue (Pet. Br. 18-19, 22-26) that the statute's legislative history shows that Congress specifically intended that the Act generally be applied retroactively. This argument simply misunderstands the statute's structure and legislative history.

1. It is important to recognize at the outset that canons which ordinarily counsel in favor of searching for a construction that gives all language in a statute independent

[4] Indeed, construing the language of Section 402(a) as generally making the Act retroactive would run afoul of the canon of construction that courts should construe statutes, if at all possible, so as to avoid constitutional problems. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Although petitioners apparently do not claim that the Act applies to cases in which final judgments have been entered, they do not point to anything in the language of Section 402(a) that purports to draw a distinction between final and non-final judgments. This statutory omission would raise serious due process concerns if the Act were construed generally to apply retroactively. *See, e.g., Hodges v. Snyder*, 261 U.S. 600, 603 (1923).



and particular effect cannot be mechanically applied in the context of this Act's effective date provisions. Although petitioners and the Solicitor General bring *three* effective date provisions to the attention of the Court, they studiously and tellingly ignore a *fourth* effective date provision in the Act. Section 110 of the Act establishes an institute through which the EEOC is to provide technical assistance and training on employment discrimination laws and regulations, and subsection (b) of that provision states that: "The amendment made by this section shall take effect on the date of the enactment of this Act." 105 Stat. 1078. This language is essentially identical to, and *unavoidably* redundant of, the pertinent language in Section 402(a). That being the case, it is doubtful that the canons of construction upon which petitioners and the Solicitor General rely can bear the weight that is being placed upon them in this case. *See* 2A N. Singer, *Sutherland Statutory Construction* § 47.37, at 258 (4th rev. ed. 1984) (independent and particular meaning need not be given "where [it is] apparent from the context of the act that the [provision] is surplusage"); *see also Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989) (" 'Many of the benefits incorporated in section 1002(1) by the cross-reference to section 186(c) are already found in section 1002(1). Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section 1002(1)' " (citation omitted)).

2. In all events, Section 402(a) need not be construed as making the Act generally retroactive in order to give effect to all of the statute's effective date language. The contrary argument of petitioners and the Solicitor General (Pet. Br. 15-16; U.S. Br. 7, 12-14) is in error.

Section 402(a)'s "except as otherwise specifically provided" qualifying clause plainly can find independent and particular effect without construing Section 402(a) as

generally making the Act retroactive. Section 102 of the Act, which creates limited rights to compensatory and punitive damages (as well as to jury trials in cases seeking such damages), applies in cases brought under the ADA as well as in cases brought under Title VII. But the employment law provisions of the ADA were not to become effective until July 26, 1992—more than seven months after the date of the Civil Rights Act's enactment. *See* Pub. L. No. 101-336, § 108, 104 Stat. 337 (1990) (codified at 42 U.S.C. § 12111). Thus, construing the Act to apply only prospectively does not in any way render Section 402(a)'s qualifying clause superfluous; that clause had the effect of ensuring that the Act's damages and jury trial provisions did not become effective for ADA cases until the employment law provisions of the ADA themselves became effective.

It is likewise clear that Section 402(a) need not be construed as generally making the Act retroactive in order to give independent and particular effect to Sections 109(c) and 402(b) of the Act, the two provisions of the Act which unambiguously state that specified sections of the statute do not apply to pre-enactment conduct or trials. Retroactivity is not the only statutory alternative to such unambiguous prospectivity provisions. Ambiguity that leaves the ultimate resolution of the prospectivity versus retroactivity question to judicial default rules of construction is an equally plausible statutory alternative. So understood, the language of Section 402(a) has an independent and particular effect—specifically, it avoids an unambiguous resolution of the prospectivity versus retroactivity question for the Act in general that Sections 109(c) and 402(b) expressly and unambiguously resolve for the particular statutory provisions to which they apply.[5]

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[5] As petitioners concede (Pet. Br. 19, 22-23), Congress was aware, as it is presumed to be aware, that there was an "apparent tension" in this Court's case law concerning whether ambiguous statutory language is presumed prospective or retroactive. *See Bonjorno*, 494 U.S. at 837. This tension created some risk that the courts might eventually hold the Act generally to apply retroactively, notwithstanding the presumptive inference that the Act should be expected to be construed as prospective only—just as other statutes containing language like that in Section 402(a) had been construed. By making Sections 109(c) and 402(b) unambiguously prospective, Congress ensured that the statutory provisions to which those sections specifically relate would in no event be applied retroactively—no matter how the "apparent tension" in the prospectivity case law is resolved and no matter how the various default rules of construction are reconciled. This Court has recognized that Congress sometimes enacts such statutory "insurance" provisions. *See, e.g., Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 838-39 & n.13 (1988); *County of Oregon v. Gunther*, 452 U.S. 161, 170 (1981); *see also Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989).



3. Contrary to petitioners' argument, the Act's legislative history in fact confirms that Congress did not understand either the qualifying clause to Section 402(a) or Sections 109(c) and 402(b) to imply that Section 402(a) makes the Act generally apply retroactively. Indeed, the legislative history confirms that the sponsors of these provisions intended the Act to apply only prospectively.

a. Before Congress enacted Section 402(a), various factions in Congress attempted to enact civil rights legislation that was expressly retroactive. The Civil Rights Act of 1990 included explicit retroactive transition provisions. *See* H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 9, § 15 (1990). But President Bush vetoed the 1990 bill, citing, among other objectionable features, its "unfair retroactivity rules." *See* 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990).

At the beginning of the 102d Congress, Representative Brooks introduced H.R. 1 as the Civil Rights Act of 1991. 137 Cong. Rec. E14 (daily ed. Jan. 3, 1991). Like the vetoed Civil Rights Act of 1990, H.R. 1 contained explicit retroactive transition rules. H.R. 1 stated,

for example, that Section 12 (the predecessor to Section 101 of the Act) would "apply to all proceedings pending on or commenced after June 15, 1989." H.R. 1, 102d Cong., 1st Sess., § 15(a)(6) (Jan. 3, 1991).

The House ultimately passed the Brooks-Fish substitute, which differed from H.R. 1 in only one respect that is significant here. In response to this Court's 1991 decision in *EEOC v. ARAMCO*, 111 S. Ct. 1227 (1991), the substitute contained a provision "extend[ing] Title VII coverage to United States citizens who are employed abroad by American firms." 137 Cong. Rec. H3934 (daily ed. June 5, 1991); *see* H.R. 1, 102d Cong., 1st Sess. § 119(c) (June 11, 1991). This provision, which ultimately became Section 109 of the Act, expressly stated that it did not "apply with respect to conduct occurring before the date of enactment of the Act," a reservation that was clearly necessary at the time because H.R. 1 was otherwise expressly retroactive. *Compare id.* at § 113 (*see* 137 Cong. Rec. H3925 (daily ed. June 5, 1991)) *with id.* at § 119(c) (*see* 137 Cong. Rec. H3926).

b. Although the House passed the Brooks-Fish substitute, Senator Danforth and a coalition of eight other Senate Republicans believed that "there [was] almost no chance that [it] [would] be enacted into law." 137 Cong. Rec. S7020 (daily ed. June 4, 1991). They thus introduced a package of three compromise bills—S. 1207, S. 1208, and S. 1209, 102d Cong., 1st Sess. (1991). 137 Cong. Rec. S2071-78. Section 3 of S. 1207 contained the language that is now Section 101 of the Act. *See id.* at S7021. Section 13(a) contained the predecessor to Section 402(a), stating that, "[e]xcept as provided in subsection (b), this Act and the amendments made by this Act shall take effect upon enactment." *Id.* at S7023. Section 13(b) stated that "[t]he amendments made by Section 5," which had to do with certain challenges to consent orders, "shall apply to proceedings pending on or commenced after June 12, 1989." *Id.*



Although the Administration had fewer objections to this package of bills than it did to the Brooks-Fish substitute, it did object to several provisions, including Section 13(b)'s retroactive application of Section 5. *See* 137 Cong. Rec. S8984 (daily ed. June 27, 1991). On June 27, 1991, Senator Danforth and his Republican co-sponsors attempted to meet the Administration's various concerns by introducing S. 1407, S. 1408 and S. 1409, 102d Cong., 1st Sess. (1991), as substitutes for their initial bills. *See* 137 Cong. Rec. S8983-89 (daily ed. June 27, 1991). In regard to the retroactivity issue, Senator Danforth and his co-sponsors stated that their substitute "made the section in question prospective." *Id.* at S8984. This was accomplished by providing that "[t]his Act and the amendments made by this Act shall take effect upon enactment." 137 Cong. Rec. S8987 (daily ed. June 27, 1991).

As introduced, S. 1407 also contained the *ARAMCO* provision that had been in the Brooks-Fish substitute version of H.R. 1, including the language stating that "[t]he amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act." S. 1407, § 11, 102d Cong., 1st Sess. (1991). *See also* 137 Cong. Rec. S8986-87 (daily ed. June 27, 1991). None of the sponsors so much as mentioned the inclusion of the *ARAMCO* provision.

c. S. 1407, S. 1408, and S. 1409 were then combined and redesignated as S. 1745, which contained the language of Sections 402(a) and 109(c) as eventually enacted. *See* S. 1745, 102d Cong., 1st Sess. (Sept. 24, 1991); *see also* 137 Cong. Rec. S13581-82 (daily ed. Sept. 24, 1991). About a month later, the redesignated bill obtained the support of leading Republicans and Democrats, including Senators Hatch and Kennedy, when a compromise was reached on its treatment of the burden of proof rules applicable in disparate impact cases. *See* 137 Cong. Rec. S15233, S15237 (daily ed. Oct. 25,

1991) (statements of Sen. Kennedy and Sen. Hatch). As part of that compromise, the Republican and Democratic leaders agreed to include the amendment that is now Section 402(b) of the Act, with its highly specific effective date provision, to ensure that the Wards Cove Packing Company could not possibly be affected by the Act's passage. *See* 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991) (§ 22(b)). The compromise did not change in any way the provisions that would become Sections 402(a) and 109(c) of the Act. *See id.* at S15275 (§ 12(c)); *id.* at S15276 (§ 22(a)).

On October 30, 1991, Senator Danforth introduced an interpretive memorandum on behalf of himself and the original co-sponsors of S. 1745 which reiterated their view that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively." 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). Senator Danforth explained that the addition of Section 402(b) "is intended only to provide additional assurance that the provisions of the bill will not be applied to certain cases that fit the provisions of that subsection. It should not be read in derogation of the sponsors' intention not to provide for retroactive effect or application as expressed in [Section 402(a)] of the bill." *Id.* at S15483 (statement of Sen. Danforth). However, even though these statements were consistent with all prior explanations that Senator Danforth had made about the effect of the language in Sections 402(a) and (b), Senator Kennedy took the floor and stated that "[i]t will be up to the courts to determine the extent to which the bill will apply to cases and claims that were pending on the date of enactment." *Id.* at S15485 (statement of Sen. Kennedy).

The Senate thereafter proceeded inadvertently to omit Section 402(b) from the draft of the bill that, on October 30, 1991, was passed. Accordingly, on November 5, 1991, Senator Dole insisted that the bill be returned to



the floor so that Section 402(b) could be reinserted into it. *See, e.g.*, 137 Cong. Rec. S15953 (daily ed. Nov 5, 1991) (statement of Sen. Dole). In reintroducing Section 402(b), Senator Dole reiterated that: "[a]bsolutely no inference is intended or should be drawn from the language of this amendment to section 402 that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." *Id.* at S15953. Senator Kennedy supported Senator Dole's resolution, stating that, "[i]ronically, the defeat of the . . . amendment would make it more likely the courts would not apply the restorations to any pending cases, including the Wards Cove case." *Id.* at S15963 (statement of Sen. Kennedy).

d. This legislative history is entirely inconsistent with petitioners' argument that the qualifying clause to Section 402(a) and the unambiguous prospectivity provisions of Sections 109(c) and 402(b) demonstrate a clear and unequivocal intent of Congress that the Act generally would apply retroactively to conduct and trials occurring before the date of its enactment. On the contrary, as explained above, the legislative history shows that Section 402(a)'s "except as otherwise specifically provided" language originated in S. 1207, which, at that time, had an expressly retroactive provision. It also shows that Section 109(c)'s unambiguous prospectivity language originated in the Brooks-Fish substitute for H.R. 1, which was otherwise expressly retroactive at the time. And the unambiguous prospectivity language of Section 402(b) was placed into the Act expressly to protect the Wards Cove Packing Company from any judicial shifts in the underlying presumption of prospectivity. Indeed, the legislative history shows that the original sponsors of these various provisions understood them to establish prospectivity for the Act, both generally and particularly.[6]

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[6] Petitioners incorrectly suggest (Pet. Br. 23) that the views of Senator Kennedy provide a basis for a contrary understanding. Senator Kennedy had no hand in drafting Section 402(a) and was

4. In all events, the statute's structure and legislative history do not justify generally applying the Act retroactively. At most, they only create doubt about the statute's intended meaning. They plainly do not establish the clear and unequivocal command that is needed for the Act to be applied to conduct or trials occurring before the date of the statute's enactment.

### C. The Purposes Of The Act Do Not Establish A Clear And Unequivocal Command For Retroactivity

Quoting from the sole appellate decision that has found a clear and unequivocal command for general retroactive application of the Act's provisions, *see Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993), petitioners and the Solicitor General join the *Landgraf* petitioners in objecting (Pet. Br. 33, 37; U.S. Br. 27-28; Pet. Br. No. 92-757, at 34-35) that it would undermine the purposes of the Act to continue to apply judicial decisions that the 1991 Congress deemed incorrect and remedies and procedures that the 1991 Congress found inadequate. But this objection starts from a false premise.

The Act does not purport to pursue the "purposes" that this objection attributes to it. In the relevant "Findings" provisions of the statute, the 1991 Congress stated only that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace[,]" and that "'egislation is necessary to provide additional protections against unlawful discrimination in employment." CRA §§ 2(1), 2(3); 105

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not its sponsor. Rather, as shown above, he became a supporter of the bill late in the legislative process, after and as a result of a key compromise on the Act's treatment of the burden of proof rules applicable in disparate impact cases. *See* 137 Cong. Rec. S15233, S15237 (daily ed. Oct. 25, 1991) (statements of Sen. Kennedy and Sen. Hatch). Thus, Senator Kennedy's subsequently stated views on the issue of retroactivity are not entitled to special weight; and, in all events, Senator Kennedy stated only that the courts would determine the extent to which the Act would apply to pending cases, *not* that the Act would be fully retroactive in all instances except those set forth in Sections 109(c) and 402(b).



Stat. 1071. In the relevant "Purposes" provisions of the Act, the 1991 Congress stated only that it intended "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace[,]" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes . . . ." CRA §§ 3(1), 3(4); 105 Stat. 1071. There is no finding or stated purpose that the Act's new provisions are to be applied to conduct or trials that have already occurred; indeed, the concepts of "deterring" and "providing additional protections" against unlawful conduct, and of "expanding" the scope of the civil rights laws, suggest precisely the opposite conclusion.

This Court should not simply assume on the basis of "vague notions of [the Act's] 'basic purpose' " that Congress intended to act retroactively. *Mertens v. Hewitt Assocs.*, 61 U.S.L.W. 4510, 4515 (U.S. June 1, 1993). Like so many statutes, this Act purported to settle "innumerable disputes between powerful competing interests —not all in favor of potential plaintiffs." *Id.* Particularly in these circumstances, it would " 'frustrate[] rather than effectuate[] legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.' " *PBGC v. LTV Corp.*, 496 U.S. 633, 647 (1990) (citation omitted) (emphasis in original). Indeed, as this Court has observed, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991). The statute's text and legislative history, when read in conjunction with the traditional presumption of prospectivity, establish that Congress intended to change the rules only for future conduct and future trials; the fact that Congress decided to revise the civil rights laws in response to decisions of this Court, and to expand the remedies and procedures of the pre-existing statutory scheme,

simply does not suggest, much less establish, that Congress intended to act retroactively.[7]

## III. THE PRESUMPTION THAT A STATUTE DOES NOT APPLY TO CONDUCT OR TRIALS OCCURRING BEFORE THE DATE OF ITS ENACTMENT APPLIES TO SECTION 101 OF THE CIVIL RIGHTS ACT OF 1991

Apparently recognizing that the text, legislative history and purposes of the Civil Rights Act of 1991 do not clearly and unequivocally command retroactive application of any of its provisions, petitioners and the Solicitor General argue in the alternative (Pet. Br. 20-44; U.S. Br. 7-9, 17-28) that, at least with respect to Section 101 of the Act, no such command is necessary. Rather, citing *Bradley v. School Board*, 416 U.S. at 711, which stated that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," petitioners and the Solicitor General argue that the rights expressly stated in Section 101, and its correlative remedies and jury trial rights, must be judicially presumed to apply even to conduct and trials that, as here, occurred prior to the statute's enactment. This argument should be rejected.

### A. Petitioners Err In Characterizing Section 101 As A Mere Remedial, Procedural Or Restorative Law

As petitioners and the Solicitor General ultimately concede (Pet. Br. 30, 39-43; U.S. Br. 7-8, 17-21), this

[7] Congress regularly passes legislation that overrules decisions of this Court (and the lower federal courts) and that adds new remedies and procedures to pre-existing statutory schemes. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 335-36 (1991) (since 1975, Congress has annually overruled an average of 12 Supreme Court decisions). The argument of petitioners and the Solicitor General does not and cannot explain why this Act, but not all of these countless other statutes, should be interpreted to apply retroactively.



Court's decision in *Bennett v. New Jersey*, 470 U.S. at 639, makes it clear that the presumption of retroactivity arguably found in *Bradley* must be reconciled with the traditional presumption of prospectivity and cannot apply to laws that "affect[] substantive rights and liabilities." Petitioners and the Solicitor General seek to avoid *Bennett* by arguing (Pet. Br. 30-39; U.S. Br. 9, 25-28) that, as a remedial, procedural and restorative law, Section 101 does not "affect[] substantive rights and liabilities." But, even assuming, *arguendo*, that remedial, procedural and restorative laws do not affect substantive rights and liabilities, which they may and frequently do, it is clear that petitioners and the Solicitor General err in characterizing Section 101 as a mere remedial, procedural and or restorative law.

#### 1. *Section 101 Does Not Merely Create New Remedies And Jury Trial Rights For Pre-Existing Wrongs Under Title VII*

Contrary to the argument of petitioners and the Solicitor General (Pet. Br. 32-33; U.S. Br. 25-26), Section 101 does not merely create new remedies and jury trial rights for pre-existing wrongs under Title VII. As the Solicitor General concedes (U.S. Br. 26 n.16), Section 101 prohibits much conduct that Title VII does not prohibit (*e.g.*, Section 101, but not Title VII, applies to small employers), and thus it is inaccurate to say that the two statutes enact the same substantive norm. Even more importantly, however, even if Section 101 and Title VII enacted the same substantive norm, it is nevertheless still the case that Section 101 is a distinct positive law. For this reason, as every court of appeals to address the question has concluded, Section 101 cannot properly be characterized as merely creating new remedies and jury trial rights for pre-existing wrongs under Title VII, much less retroactive ones. *See Hicks v. Brown Group, Inc.*, 982 F.2d 295, 297 (8th Cir. 1992) (en banc), *petition for cert. filed*, 61 U.S.L.W. 3669 (U.S. Mar. 23, 1993)

(No. 92-1538); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 n.5 (11th Cir. 1992); *Gersman*, 975 F.2d at 899; *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-737).

That Title VII may already have proscribed some conduct that Section 101 now also proscribes is legally irrelevant. This Court has recognized that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). It has thus held, for example, that the non-discrimination rights and obligations that collective bargaining agreements create and that are enforceable under the federal labor laws must be treated as legally distinct from the non-discrimination rights and obligations that Title VII creates—even if they are identical in content. *Id.* at 50-51. Likewise, the Court has long held that the rights that Section 1981 and Title VII establish are "separate, distinct, and independent." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 476 n.14 (1975); *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979). As with Title VII and these other laws, Title VII and Section 101 were enacted at different times, and by different Congresses. Thus, the substantive rights and obligations positively created by Title VII and Section 101, while similar in content in certain respects, must be treated as legally distinct and independent from each other. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). The amendment that Section 101 makes to Section 1981 is not drained of its substantive content simply because Title VII contains a somewhat similar behavioral prohibition.



Indeed, to treat Section 101 as merely creating new (retroactive) remedies and procedures for pre-existing wrongs under Title VII would frustrate the intent of Congress. In enacting Section 101, Congress treated it as statutorily separate and distinct from the rights and enforcement scheme of Title VII. Thus, whereas Section 101 expressly expands the substantive rights (and thus implicitly expands the correlative remedies and jury trial rights) available in Section 1981 cases, it is Section 102 of the Act that supplies new damages remedies and jury trial rights for cases brought to enforce rights created under Title VII. The new damages remedies and jury trial rights available under Section 102, however, are subject to distinct statutory limitations that do not apply to or limit cases brought under Section 101; just as the markedly different remedies and procedures available under Title VII, as originally enacted, were subject to distinct statutory limitations not applicable to Section 1981. *See United States v. Burke*, 112 S. Ct. 1867, 1873 & n.12 (1992). Thus, Section 102 confirms that the remedies and procedures available under Section 101 are not to be applied in cases involving Title VII's prohibitions and, concomitantly, that Section 101 may not properly be treated as a mere (retroactive) remedial and procedural supplement to Title VII. To do so would violate the "frequently stated principle of statutory construction . . . that[,] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *see also, e.g., Patterson*, 491 U.S. at 181; *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976).[8]

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[8] The question whether the new damages remedies and jury trial rights created by Section 102 of the Act apply retroactively is at issue in the companion case to this one, *Landgraf v. USI Film Products*, No. 92-757. However, petitioners in this case have not argued that Section 102 applies retroactively to their Title VII claims; their argument is limited to whether Section 101 of the Act applies retroactively to their Section 1981 claims.

### 2. *Section 101 Is Not A Mere "Restorative" Law*

Just as it does not merely create new remedies and procedures for pre-existing wrongs under Title VII, Section 101 does not merely "restore" Section 1981 to the state allegedly intended by the Congress that enacted it. The contrary argument of petitioners and the Solicitor General (Pet. Br. 35-39; U.S. Br. 26-28) is plainly wrong.

To begin with, petitioners err in their repeated, self-serving—and, we believe, legally irrelevant—assertion (Pet. Br. 10-11, 27-28, 35-39) that it was clear at the time of the conduct at issue in this case that respondent could be held liable under Section 1981 for the alleged discriminatory discharges of petitioners. At the time, it was clear that several Justices of this Court held the view that the interpretation of Section 1981 announced in *Runyon v. McCrary*, 427 U.S. 160 (1976), was incorrect and that *Runyon*'s reach should be limited, if not reconsidered. *See id.* at 187 (Powell, J., concurring); *id.* at 192 (White, J., & Rehnquist, J., dissenting); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 406 (1982) (Stevens, J., concurring). Moreover, at the time, while a number of courts had held or assumed that Section 1981 applied to discriminatory discharge claims, a number of lower courts had held that Section 1981 did not apply to all aspects of the employment relationship. *See, e.g., Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F. Supp. 752, 757 (W.D. Mo. 1986); *Minority Police Officers v. City of South Bend*, 617 F. Supp. 1330, 1352 n.52 (D. Ind. 1985), *aff'd*, 801 F.2d 964 (7th Cir. 1986) (same). Indeed, the Fourth Circuit decision that led to the certiorari grant and ultimate decision in the *Patterson* case had been fully briefed and argued by this time—and was rendered only two months later. *See Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986). In short, the law under Section 1981 was in a state of flux at the time, and it was certainly foreseeable that, when presented



with the question, this Court might hold Section 1981 to be inapplicable to claims that did not concern the initial formation or enforcement of a contract. *See Gersman*, 975 F.2d at 900 n.7 ("[I]t is far from altogether clear that the law before *Patterson* was universally perceived to be contrary to the *Patterson* holding.").

In any event, petitioners plainly err in suggesting that the question whether Section 101 is a "restorative" law can properly be determined by reference to what conduct particular individuals may at the time have subjectively believed was or was not covered by Section 1981. The nature and reach of a law cannot shift and spring on the basis of such individual expectations and understandings; to allow it to do so would result in courts having to make unwieldly distinctions between litigants on the basis of their equitable and reliance interests and, even more importantly, to treat similarly-situated litigants differently merely because they viewed the requirements of the law differently. *Accord, Harper v. Virginia Dep't of Taxation*, No. 91-974, slip op. at 6-7, 8-9 (U.S. June 18, 1993).

Indeed, in the context of determining whether a subsequent law is "restorative" of a prior law, it is inconceivable that the issue would turn on the subjective or, for that matter, the objective understandings of the prior law by particular individuals. No private individual can determine what Congress will intend to do in a later enactment. Only the later enacting Congress can determine whether it is "restoring" either a prior Congress's supposed intent or a prior judicial interpretation of that intent. Moreover, while the consistency and quality of judicial interpretations of a prior law may influence the later Congress's judgment about whether it is appropriate to enact a "restorative" law, such interpretations are not determinative of that subsequent congressional intent. Rather, that subsequent intent can be established only by the language, structure, and legislative history of the subsequent statute. And, contrary to petitioners' argument, the language, structure, and legislative history

of the Civil Rights Act of 1991 do not manifest an intent to "restore" Section 1981 to some alleged prior state—much less to "restore" it retroactively.

As noted above, the Act's "Findings" section speaks only of the need for "*additional* protections against unlawful discrimination in employment" and "*additional* remedies . . . to deter" such discrimination. CRA §§ 2(1), 2(3); 105 Stat. 1071 (emphases added). As also noted above, the Act's stated "Purposes" are, among other things, only "to provide appropriate remedies for intentional discrimination," "to codify" this Court's definitions of "business necessity" and "job related" in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and subsequent decisions, and "to respond" to other decisions of this Court, including *Patterson*, "*by expanding* the scope of relevant civil rights statutes." CRA §§ 3(1), 3(2), 3(4); 105 Stat. 1071 (emphasis added). The Act thus does not state anywhere that it intends to "restore" Section 1981 to any supposed prior state.

In fact, the omission of such a stated intent was not accidental. The Act's legislative history shows that certain factions in Congress wished to pass legislation with express statements of "restorative" intent. But they failed. And the final statutory language points in the other direction.

As is implicit in petitioners' argument (Pet. Br. 25, 38-39 n.36), the Bush Administration initially opposed any legislative revision of Section 1981 as interpreted by the *Patterson* Court, preferring instead to study the effects of the Court's interpretation. Moreover, when the Administration finally agreed to a legislative revision of Section 1981, then-Deputy Attorney General Donald B. Ayer explicitly testified:

> that important changes are necessary in two areas. The first is the situation posed by the U.S. Supreme Court's decision in the *Patterson* case involving section 1981 . . . . The U.S. Supreme Court read



> . . . the words "make and enforce," which are indeed the words of the statute, to mean precisely that, one might say read them narrowly in terms of their precise meanings, and I must say in that, I think, acted reasonably.
>
> But at the same time as I say they acted reasonably, I think the Court left us with a situation plainly requiring legislative change.

*Civil Rights Act of 1990: Hearing on S. 2104 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 107 (1990); *see id.* at 105 ("the decisions . . . are well within the zone of reasonable interpretation"). Deputy Attorney General Ayer's views were echoed by key Republicans in Congress. *See, e.g.*, 135 Cong. Rec. S10221 (daily ed. Aug. 4, 1989) (statement of Sen. Hatch) (noting that the *Patterson* Court gave "[a] reasonable reading" of Section 1981); 136 Cong. Rec. S1523 (daily ed. Feb. 22, 1990) (statement of Sen. Dole) ("Although [*Patterson*] . . . may have been correct as a matter of statutory construction, the Justice Department believes—and I agree—that legislation is needed to ensure that the underlying purposes of our Federal civil rights laws are not needlessly frustrated.").

Of course, the Civil Rights Act of 1990 nevertheless included express "restorative" language. *See* S. 2104, 101st Cong., 1st Sess. (1990), *reprinted in* 136 Cong. Rec. H6827-30 (daily ed. Aug. 3, 1990). S. 2104 stated that its purpose, among other things, was "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." *Id.* at H6827 (§ 2(b)(1)). Moreover, the bill had two provisions with express "restorative" intents: Section 4 was entitled "Restoring The Burden Of Proof In Disparate Impact Cases," *id.* at H6827-28; and Section 12, which addressed the *Patterson* decision, was entitled "Restoring Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts," *id.* at H6829. Indeed, Section 15 set out express

rules for applying those various provisions retroactively, including Section 12. *Id.*

But President Bush vetoed the Civil Rights Act of 1990. *See* 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990). Moreover, in his veto message, President Bush made it clear that he did not view the Administration's proposal to revise Section 1981 as serving a "restorative" purpose at all; rather, he explained that his alternative bill would "create expanded protections against on-the-job racial discrimination by extending 42 U.S.C. § 1981 to the performance as well as the making of contracts." 136 Cong. Rec. S16418 (daily ed. Oct. 22, 1990).

In 1991, the battle among the competing factions continued. The House passed H.R. 1, which, like the vetoed Civil Rights Act of 1990, contained express indications of both a restorative and retroactive intent. *See* H.R. 1, 102d Cong., 1st Sess. §§ 2(b)(1), 102, 110, 113 (June 11, 1991). Ultimately, however, a majority agreed upon provisions with titles that do not have express restorative purposes (or retroactive transition rules). *See* CRA § 105, 105 Stat. 1074 ("Burden of Proof in Disparate Impact Cases"); CRA § 101, 105 Stat. 1071 ("Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts"). And the majority agreed that the Act's express "Purposes" would speak only of "respond[ing]" to Supreme Court decisions, and of "expanding" the remedies and protections of the civil rights laws, rather than "restoring" them. *See* CRA § 3, 105 Stat. 1071.[9]

[9] In doing so, some members of Congress claimed that the revision to Section 1981 served a restorative purpose, while others claimed that it did not. *Compare* 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991) (Edwards interpretive memorandum) (Section 101 has restorative purpose); *id.* at S15234-35 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) (same); *with id.* at H9543 (daily ed. Nov. 7, 1991) (Hyde interpretive memorandum) (Section 1981 is being expanded); *id.* at S15472 (daily ed. Oct. 30, 1991) (Dole interpretive memorandum) (same).



Thus, the text and legislative history of the Act fail to support petitioners' contention that Congress had a different opinion as to the original meaning of the Civil Rights Act of 1866 than did this Court and, in passing Section 101, was acting to "restore" that original intent or some prior judicial interpretation of that intent. While some factions in Congress may have held this view, neither the statute's text nor its legislative history suggests that a majority agreed upon it.

### B. Even Remedial, Procedural And Restorative Laws Are Subject To The Traditional Presumption Of Prospectivity

In any event, even if Section 101 of the Act could properly be characterized as in some sense "remedial," "procedural" or "restorative," it still would be subject to the traditional presumption that statutes are not applied to conduct or trials occurring before the dates of their enactment unless Congress has clearly and unequivocally so required. The Court has in fact held that the "rule [t]hat a statute shall not be given retroactive effect unless such a construction is required by explicit language or by necessary implication . . . has been applied by this Court to statutes governing procedure," *United States v. St. Louis, San Francisco & Texas Ry.*, 270 U.S. 1, 3 (1926). It is therefore clear that that presumption would apply in the event a litigant was seeking retroactive application of a new, free-standing jury trial right to a trial that had already occurred. However, in the context of Section 101, there is no separate issue as to whether a free-standing jury trial right is presumed to apply only prospectively; the jury trial right that is implicitly embodied there applies only where the substantive right and correlative remedies of that section apply. And it is clear that the traditional presumption applies to Section 101's substantive rights and correlative remedies, even if they could be described as having a "remedial," "procedural," or "restorative" character.

### 1. *New Damages Rules And Restorative Laws May Affect Substantive Rights And Liabilities*

Contrary to the argument of petitioners and the Solicitor General, new damages rules and supposedly restorative laws are plainly laws that may "affect[] substantive rights and liabilities," laws which even petitioners and the Solicitor General admit (Pet. Br. 30, 39-44; U.S. Br. 17-21) are subject to the traditional presumption of prospectivity. While the Court has not had occasion specifically to discuss what laws may "affect[] substantive rights and liabilities," it has equated that phrase with the scope of the traditional presumption of prospectivity. *See Bennett v. New Jersey*, 470 U.S. at 639. Moreover, the Court has held that the traditional presumption of prospectivity applies to any law "by which human action is regulated." *Union Pacific R.R. v. Laramie Stock Yards*, 231 U.S. 190, 199 (1913). *Accord, Reynolds v. M'Arthur*, 27 U.S. at 434. New damages rules and supposedly restorative laws plainly may constitute such laws.

a. Just as with laws that impair vested rights or establish new standards of conduct, laws that create new damages rules regulate human action—*i.e.*, they materially change the legal consequences of human behavior. Thus, in its Ex Post Facto cases, the Court has said that " '[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty' after the fact." *Weaver v. Graham*, 450 U.S. 24, 28 n.9 (1981) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798) (Paterson, J.)). *See also Miller v. Florida*, 482 U.S. at 433 ("a change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.' " (citation omitted)). And, likewise, in its civil cases, the Court has applied the traditional presumption of prospectivity to laws that would increase, for example, the interest award that attaches to a liability. *See United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928). A retroactive change in the damages rules applicable to a claim "attaches a new disability, in respect to transactions or considerations already past," *Sturges v. Carter*, 114 U.S. 511, 519 (1888), and thereby plainly "affect[s] a substantive right or liability," *Bennett*, 470 U.S. at 639.



Importantly, application of the presumption of prospectivity to new damages rules furthers the policy that citizens should have a fair opportunity to avoid the sanctions established for the law's violation. As Judge Posner has explained, "[t]he amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change." *Luddington*, 966 F.2d at 229. "That is the philosophy behind the ex post facto clause and also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date." *Id.*

Contrary to the argument of the Solicitor General and the petitioners in these consolidated cases (Pet. Br. 28-29; U.S. Br. 22-23; Pet. Br. No. 92-757, at 31-32), this understanding of the presumption does not assume that an employer has a "vested right to do wrong" or can "pay for the right to discriminate." It is important to remember that, while Section 101 prohibits only intentional discrimination, the argument that remedial laws should be presumed retroactive cannot logically be limited to the intentional discrimination context. Rather, the argument extends to all sorts of laws—*e.g.*, tax laws, immigration laws, farm crop subsidy laws, and all types of employment laws, including those that impose liability on the basis of negligence, recklessness or even just socially unacceptable consequences (such as a law that prohibits employment policies with a disparate impact which are not justified by "business necessity"). Even the *Landgraf* petitioners appear to concede (Pet.

Br. No. 92-757, at 32 n.28) that, in such contexts, the law in fact routinely instructs individuals to determine the amount of care that must be taken by, among other things, comparing the costs and benefits of taking additional precautions.

Even in the context of intentional discrimination laws, the suggestion that a presumption of prospectivity for remedial laws assumes that an employer has a right to pay to discriminate is more invective than analysis. As the late-Justice Marshall recognized:

> An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy.

*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring). The question, then, that employers face is not whether they should pay for the right to intentionally discriminate. Rather, the question for an employer is how much to invest in programs for education, training, detection, discipline and other methods of prevention to ensure that *others* do not intentionally discriminate (or appear to have discriminated), and thereby cause liability to be vicariously imposed on the employer through principles of *respondeat superior*. Knowledge of the remedies applicable under a statute plainly and properly affect an employer's entirely non-discriminatory resolution of this negligence-type question. *See id.* at 70-72 (agreeing with EEOC that employer liability under Title VII for sexual harassment may be affected by the precautions and safeguards that an employer has adopted); *Jett v. Dallas Independent Sch. Dist.*, 491 U.S. 701, 728 (1989) (holding that, if municipalities were subject to *respondeat superior* liability under



Section 1981, "the careful balance drawn by the 42d Congress between local autonomy and fiscal integrity and the vindication of federal rights could be completely upset").[10]

While the foregoing suffices for present purposes, we would add that the presumption of prospectivity naturally and properly extends to protecting expectations about the remedial consequences of even calculated non-compliance with the law. In the criminal context, it is plain that the Ex Post Facto Clause protects such expectations. *See Weaver*, 450 U.S. at 30; *James v. United States*, 366 U.S. at 247 n.3 (Harlan, J.). In the civil context, while the constitutional prohibition is not nearly so absolute, the philosophy of the *ex post facto* rule still applies, for "many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable [for]" substantially increased civil sanctions—*e.g.*, civil forfeiture of their cars. *See Luddington*, 966 F.2d at 229. Indeed, in both the civil and criminal contexts, the

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[10] Indeed, even where an employer's own allegedly intentionally discriminatory conduct is in issue, a presumption of prospectivity for remedial laws does not assume a right to pay to discriminate. The remedies applicable to an intentional discrimination law affect whether a law-abiding employer simply avoids or postpones lawful adverse employment actions—and instead engages, for example, in progressive discipline such as warnings—because the risk and penalties of misperceived motives are too great. They also affect whether an employer engages in demographic testing or validation efforts prior to implementing an employment policy or practice. They further affect how much time, effort and expense an employer incurs in contemporaneously documenting the lawful reasons for its actions—so that its decisions will be easier to defend in the event that they are challenged. In addition, the available remedies affect whether an employer obtains a legal opinion before going forward with a decision, or offers severance pay in exchange for a release of a possible claim. And the remedies applicable to a possible claim affect the time, effort and expense that an employer incurs in preserving and preparing the testimony of witnesses, developing its litigation strategy, and putting on its case at trial. In other words, the remedies available under a law shape a wide variety of behavior that is entirely independent of any decision whether to violate the law.

retroactive application of new sanctions is inconsistent with the principle that legislatures are ill-suited to the task of retrospectively identifying wrongdoers and imposing punishments. *Id.* at 228; *see also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. at 17-18 (the Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness."). In short, even in the civil remedial context, the traditional presumption of prospectivity furthers the principles of justice and limited government through checks and balances that underlie the historic disfavor of retroactive laws. *Accord, Luddington*, 966 F.2d at 228.

In the final analysis, therefore, there is simply nothing jurisprudentially anomalous about the situation where Congress amends a law and adds new remedies to a preexisting statutory scheme. Though it would be wrong to do so (for the reasons explained above), it may even be assumed, as do petitioners and the Solicitor General, that retroactive remedial laws harbor less potential for mischief and are less likely to upset settled expectations or impair vested rights than other kinds of laws. Those are simply reasons, however, why contemporary policies and politics may lead Congress to act retroactively, and reasons why this Court may be inclined to sustain such retroactive remedial legislation against constitutional challenge. They are not reasons to presume that Congress has chosen to act retroactively. On the contrary, because retroactive remedial laws may alter the legal consequences of human action just as surely as may laws addressing substantive standards of conduct, the judicial inquiry should remain the same—*i.e.*, the Court should require a clear and unequivocal statement by Congress of an intent to act retroactively. *Accord, Prince v. United States*, 19 F. Cas. 1331, 1332 (C.C.D. Mass. 1814) (No. 11,425) (Story, J.) ("it is a general rule, that statutes are to be construed to operate in futuro . . . . And *this maxim applies as well to remedial as to other statutes*") (emphasis added).

There is, in fact, an important practical reason to preserve the traditional presumption of prospectivity in this



context. The issue here is what the so-called default rule of construction should be in cases where Congress has failed to make its intentions clear and unequivocal. The simpler that default rule of construction is, the more likely it is that the rule will serve its purpose of allowing Congress, the courts and the citizenry to know what Congress must do in order to make its laws retroactive. As even the Solicitor General concedes (U.S. Br. 21), however, distinguishing between substantive laws, on the one hand, and remedial (and procedural) laws, on the other hand, is not a simple feat; and petitioners and the Solicitor General acknowledge that, even after that herculean feat is completed, the three-factor "manifest injustice" test still must be applied to determine whether a remedial (or procedural) law is retroactive. Indeed, the Solicitor General would add yet another level of analysis for lawsuits against the government. *See* U.S. Br. 21 n.11. It is clear, therefore, that a presumption of retroactivity for remedial (and procedural) laws would dramatically increase the work required of the courts in interpreting statutes and, even more importantly, defeat the law-informing and facilitating functions of the default rule of construction that is at issue. There is no good reason to adopt such an impractical interpretive course.

b. Nor is there good reason to adopt that interpretive course in the context of so-called "restorative" laws. "Restorative" laws plainly may change the legal consequences of human conduct. That they do so makes them quintessential examples of laws that may "affect substantive rights and liabilities."

Contrary to the suggestion of petitioners and the Solicitor General (Pet. Br. 29-30, 35-37; U.S. Br. 25-26), it does not matter that the so-called "restorative" law may be consistent as a matter of fact with the subjective or, for that matter, objective expectations of the particular parties at the time the alleged conduct took place. As noted above, litigants cannot "be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old

rule and how they would suffer from application of the new." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2447 (1991) (Opinion of Souter, J.). "The applicability of rules of law are not to be switched on and off according to individual hardship[.]" *Id.* at 2448. *Accord, Harper v. Virginia Dep't of Taxation*, No. 91-974, slip op. at 6-7 n. 9, 8-9. Indeed, a contrary rule would create "enormous satellite litigation," *Luddington*, 966 F.2d at 229, in which courts would be required to make "unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating the [passage of the statute.]" *Uncle Ben's, Inc.*, 965 F.2d at 1374. In any legal "system that aspires to fairness and equality, . . . the substantive law will not shift and spring on such a basis." *James B. Beam Distilling Co.*, 111 S. Ct. at 2447. *Accord, Harper v. Virginia Dep't of Taxation, supra.*

Nor may the retroactivity of a statute turn, as petitioners and the Solicitor General suggest (Pet. Br. 36-39; U.S. Br. 26-28), on whether a subsequent Congress purports to be correcting what it deems to be an erroneous judicial interpretation of an earlier statute. "[I]t would be naive to suppose that Congress sits to review the interpretive soundness of judicial decisions. Congress is not a judicial body, let alone a body of academic commentators on judicial decisions." *Luddington*, 966 F.2d at 228. Moreover, this Court has repeatedly stressed that " '[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,' " and that " '[i]t is the intent of the Congress that enacted [the act] . . . that controls.' " *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. at 840 (citations omitted).

"Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law." *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991). But "[w]hen a subsequent Congress amends the law in response to the



Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's 'restoration' efforts is newly created law." *Id.* at 1338. As with any newly enacted legislation, Congress must state its intentions with regard to retroactivity clearly and unequivocally. *Accord, Dash v. Van Kleeck*, 5 Am. Dec. at 312; *Luddington*, 966 F.2d at 228.

Again, "[t]here is nothing jurisprudentially unique about the situation where Congress amends a statute in response to the Supreme Court's interpretation." *DeVargas*, 911 F.2d at 1388. To be sure, the "restorative" purpose of a law may sometimes lead Congress to choose to act retroactively; it may provide the political basis for doing so (just as it may provide the political basis for enacting a purely prospective law); or it may provide a suggestion of Congress's intent to act retroactively. Restorative purpose may also in some cases provide the justification for sustaining a retroactive law against constitutional challenge. But the restorative nature of a law should not change the threshold judicial inquiry into whether Congress has acted retroactively. The principles of justice and limited government through checks and balances that underlie the presumption of prospectivity—*i.e.*, fair warning of the law and its sanctions, and limiting the ability of those who frame the law retrospectively to identify wrongdoers and impose sanctions—still require that Congress make its intent to restore the law *retroactively* clear and unequivocal. Indeed, as with new damages laws, altering the judicial inquiry for so-called "restorative" laws would needlessly increase the workload of the courts and unnecessarily complicate—in fact, defeat—the law-informing and facilitating functions of the default rule of construction that is in issue.

### 2. *This Court's Case Law Does Not Justify Excepting Remedial, Procedural Or Restorative Laws From The Traditional Presumption Of Prospectivity*

In arguing that new damages rules (and correlative jury trial rights) and restorative laws should nevertheless be presumed to apply retroactively, petitioners and the Solicitor General purport to find substantial justification for their position in this Court's case law. *See* Pet. Br. 20-22, 27-29, 33-34, 35, 39-44; U.S. Br. 17-21. But the Court's cases in fact do not justify excepting remedial, procedural or restorative laws from the traditional presumption of prospectivity.

a. To begin with, petitioners plainly err in suggesting (Pet. Br. 39-44) that, under this Court's cases, either new damages laws (and correlative jury trial rights) or restorative laws are not "retroactive" at all. Contrary to petitioners' suggestion (Pet. Br. 40), "retroactivity" is not a "term of art" which refers only to laws that would disturb vested rights or change substantive standards of conduct. Rather, the Court has defined a "retroactive" law as one that "assign[s] . . . a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pac. R.R. v. Laramie Stock Yards,* 231 U.S. at 199; *see also, e.g., Sturges v. Carter,* 114 U.S. at 519 ("'[E]very statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.'" (citation omitted)); *Miller v. Florida,* 482 U.S. at 430 ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" (citation omitted)). Thus, while some such laws (such as trial procedures) may generally have only prospective effect, it is clear that new damages rules (and correlative jury trial rights) and restorative laws may in fact be "retroactive" in their application, as they are here, in the sense this Court has defined that term.



b. Joined by the Solicitor General, petitioners also suggest (Pet. Br. 20-22, 27-29, 33-34; U.S. Br. 17-21) that this Court has a long history in its cases of presuming that remedial, procedural and restorative laws are retroactive. But the case law does not support this suggestion.

To begin with, petitioners and the Solicitor General conveniently ignore the fact that, under this Act, jury trial rights do not apply independently of the new damages remedies (and substantive rights) created by Section 101 and, accordingly, that the question whether new jury trial provisions should be presumed to apply retroactively is not separately presented. Likewise, they ignore this Court's clear statement, made over a half century ago, that the rule "[t]hat a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication . . . has been applied by this Court to statutes governing procedure." *United States v. St. Louis, San Francisco & Texas Ry.,* 270 U.S. at 3. Similarly, they ignore the many occasions on which the Court has applied the traditional presumption to procedural or remedial laws. *See, e.g., id.* (statute of limitations); *Magnolia Petroleum Co.,* 276 U.S. at 162-63 (statute determining date from which interest on tax refund may be collected); *Greene,* 376 U.S. at 160 (regulation changing conditions under which monetary restitution was payable). And, finally, petitioners and the Solicitor General do not cite even a single case that purports to hold that a "restorative" law is presumed retroactive.

Equally important, the cases that the Solicitor General and the petitioners in these consolidated cases do cite do not apply a presumption of retroactivity to new damages rules or restorative laws (or, for that matter, to new jury trial provisions). Many of the cited cases involved expressly retroactive laws or laws that drew upon antecedent facts for their operation; the question was generally whether those expressly retroactive laws were constitu-

tional.[11] Other of the cited cases concerned the retroactivity of judicial decisions, which, unlike statutes, are presumed to apply retroactively.[12] Still other of the cited cases concerned the jurisdiction or jurisdictional discretion of the courts,[13] which, as Justice Thomas recently explained, generally does not involve retroactive application of the law and, in all events, "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554, 565-66 (1992) (Thomas, J., concurring). And still other of the cited cases concerned requests for declaratory or injunctive relief against future conduct,[14] which also do not involve retroactive application of law.[15]

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[11] *See, e.g., Sampeyreac v. United States*, 32 (7 Pet.) U.S. 222, 239-40 (1833); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160, 162, 174-75 (1865); *Frisbie v. Whitney*, 76 (9 Wall.) U.S. 187, 189-90, 196-97 (1870); *Cox v. Hart*, 260 U.S. 427, 435 (1922); *United States v. Heinszen & Co.*, 206 U.S. 370, 381-82 (1907); *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978); *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107, 110 (1801).

[12] *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987).

[13] *See Bell v. New Jersey*, 461 U.S. 773, 777 n.3 (1983); *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607 n.6 (1978); *Ex Parte Collett*, 337 U.S. 55, 71 (1949) (forum non conveniens statute); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916); *Railroad v. Grant*, 98 U.S. 398, 401 (1879).

[14] *See Cort v. Ash*, 422 U.S. 66, 74 (1975); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921).

[15] Petitioners and the Solicitor General cite a number of other cases that do not fit in these categories but that still do not involve a presumption by this Court that new statutes should apply retroactively. In *Watts, Watts & Co., Ltd. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21-23 (1918), the Court simply held that the United States' declaration of war made it inappropriate for a federal court to continue with a proceeding. In *Bonet v. Texas*, 308 U.S. 463, 471 (1940), the Court held only that it could not find "clear or manifest" error in a decision of the Supreme Court of Puerto Rico that a local statute establishing a new procedure for workers' compensation laws applied to pending cases. Finally, in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982), the Court merely "assume[d], *arguendo*," that new amendments applied to a case.



Indeed, only two decisions of this Court—*Bradley v. School Board*, 416 U.S. 696, and *Thorpe v. Housing Authority*, 393 U.S. 268 (1969)—can arguably be cited for the proposition that a new statute may be presumed retroactive—remedial, procedural, restorative, or otherwise. In *Bradley*, the Court held that a new attorney fees statute applied to a case that was pending in the court of appeals at the time of the law's enactment. In *Thorpe*, the Court held that a new regulation, which was promulgated while the case was pending on certiorari and which required housing authorities to inform a tenant of the reasons for an eviction prior to instituting the eviction, should be applied to invalidate an eviction order issued almost eighteen months before the regulation was adopted. In each case, the Court justified its decision by, among other things, stating that a court—or at least an appellate court—must apply the law in effect at the time that it renders a decision.

As Justice Scalia and a number of courts of appeals have concluded, however, a rule of this type is irreconcilable with the traditional rule that statutes are presumed prospective. *See Bonjorno*, 494 U.S. at 855 (Scalia, J., concurring); *see also, e.g., Butts v. City of New York Dep't of Housing Preserv. and Dev.*, 61 Fair. Empl. Prac. Cas. (BNA) 579, 589 (2d Cir. 1993); *DeVargas*, 911 F.2d at 1390; *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374-75 (8th Cir. 1992). Moreover, the Court's decision in *Bennett* expressly rejects the broad sweep of the language in *Bradley* and *Thorpe*, and, in so doing, has arguably "deprived *Bradley* [and *Thorpe*] of [their] substantive content inasmuch as retroactive application is never sought (or defended against) except as a means of 'affecting substantive rights and liabilities' at issue in the litigation." *Bonjorno*, 494 U.S. at 853 (Scalia, J., concurring); *see also id.* at 854. In all events, this Court should make it clear that *Bradley* and *Thorpe* do not justify excepting new remedial, procedural or restorative laws from the traditional presumption of prospectivity.

First, as Justice Scalia explained in his *Bonjorno* concurrence, *id. at* 844-51, *Bradley* and *Thorpe* made no effort to reconcile their holdings or reasoning with the traditional presumption that statutes are applied only prospectively. They do not mention that traditional presumption or discuss any cases in which it was applied. Moreover, as Justice Scalia further explained, the cases that *Bradley* and *Thorpe* cite are entirely consistent with the traditional rule. The Court should hesitate to build exceptions to the traditional rule off of cases that do not even discuss it, let alone provide a reasoned basis for discarding it or departing from it. Indeed, as noted above (at page 45), to do so would conflict with cases that expressly hold that the traditional presumption is applicable, for example, to procedural and remedial laws.

Second, as noted above, in this context, a distinction between substantive behavioral rules, on the one hand, and remedial, procedural or restorative rules, on the other hand, is conceptually and practically unsound. Again, the issue here is *not* whether particular situations justify the enactment of retroactive laws; rather, the issue is what should be *judicially presumed* in the absence of clear legislative direction. Even for new remedial, procedural and restorative laws, a presumption of retroactivity is contrary to the principle that people should have fair warning of the laws against which their conduct will be measured and the sanctions that will be applied to them if they fail to conform. While that principle of justice may be less compelling to some in the context of what they regard as remedial, procedural or restorative laws, it still applies with sufficient force to recommend its use as a default rule of construction that Congress is *free to override*. Moreover, a presumption of retroactivity limited to new remedial, procedural or restorative laws is still entirely inconsistent with the principle of limited government that legislation looks forwards, not backwards, and that the power retrospectively to identify wrongdoers and punish



them is a power that should rarely, if ever, be exercised by the legislature in the course of framing the law. And a presumption of retroactivity for new remedial, procedural and restorative laws, but not for substantive laws, would needlessly increase the work of courts trying to interpret statutes, and inevitably lead to confusion and conflict in the development and administration of the law.

Indeed, the suspect nature of the entire enterprise is confirmed by the "manifest injustice" qualification that petitioners and the Solicitor General concede is necessary for a presumption of retroactivity properly to work. As is clear from their application of it in this case, the "manifest injustice" standard requires nothing less than a judicial rebalancing of the myriad economic, moral, and political considerations that Congress must consider in determining whether retroactive action is justified and desirable in a particular context. Thus, whereas the petitioners in these consolidated cases urge that the Act requires retrial of any cases pending on appeal on the date of enactment, the Solicitor General advises (U.S. Br. 24 n.14) that such retrials would be manifestly unjust where the initial trial went to judgment without error. Likewise, whereas the petitioners in these consolidated cases urge that all of the Act's damages provisions should be applied retroactively, the Solicitor General advises (U.S. Br. 23 n.13) that it may be manifestly unjust to apply the Act's punitive damages provisions retroactively. "[A] rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action." *Bonjorno,* 494 U.S. at 857 (Scalia, J., concurring). Whatever role a rule of discretion might properly play in deciding whether to apply this Court's own decisions retroactively, it seems apparent that such a rule of discretion has no proper role to play in the interpretation of statutes. *See TVA v. Hill,* 437 U.S. 153, 194-95 (1978).

In sum, with all respect, to the extent that they purport to establish a presumption of retroactivity for statutes, *Bradley* and *Thorpe* are unsound at every turn. Contrary to basic principles of justice and limited government through checks and balances, they start with the erroneous premise that retroactivity is the presumptive norm in statutory law. And, contrary to long-standing teaching about the proper role of courts in interpreting statutes, *Bradley* and *Thorpe* seek to moderate this anomalous presumption by improperly turning the law on and off according to individual hardships and reliance interests. This Court should clarify that the language concerning retroactivity in *Bradley* and *Thorpe* does not state the governing law, and that the lower courts should apply all new statutes, including the Civil Rights Act of 1991, prospectively, unless Congress has clearly and unequivocally commanded to the contrary.

## CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it held that the Civil Rights Act of 1991 was not retroactively applicable to this case.

Respectfully submitted,

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